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ALL TRUTHS ARE EQUAL, BUT ARE SOME TRUTHS MORE EQUAL THAN OTHERS?

*Susan M. Gilles**

INTRODUCTION

PROFESSOR SCHAUER ASSERTS that some true speech has no value.¹ He also seems to suggest that when such a "valueless truth" is published by a powerful person to the injury of a powerless person, an action in privacy should lie.²

If Professor Schauer's "reflection" is merely a theoretical exercise, pointing out that such a thing as "valueless truth" may exist, then his thesis is of some value. I will argue in section I that even this theoretical exercise is problematic.³ However, if Professor Schauer's "reflection" is intended to be applied to the real world of constitutional law, it provides little help and creates much danger. As I will argue in section II, Professor Schauer's thesis is of little help because he fails to provide any definition of "valueless truth."⁴ In the end this concept appears to be a nebulous first cousin to the idea of newsworthiness, which has long haunted the law of privacy

Schauer's reflections are also dangerous. section II argues that the Supreme Court is presently inclined to recognize the constitutionality of the privacy tort,⁵ which allows states to penalize

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1. See Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991). Schauer prefers the terminology "knowledge" (which focuses on "human action"), rather than "truth" (which is "a property of a proposition") but defines "knowledge" as "true belief" *Id.* at 708. I will use the terms interchangeably.

2. *Id.* at 717-24.

3. See *infra* text accompanying notes 9-19.

4. See *infra* text accompanying notes 22-23.

5. The tort of invasion of privacy as defined in the RESTATEMENT (SECOND) OF TORTS § 652A (1976) covers four distinct torts: intrusion, misappropriation, false light, and publication of private facts. This commentary focuses on the latter, and the term "private tort" will be used to refer only to that tort; that is, the publication of true private facts. A

the publication of true speech when it injures a person's privacy⁶ The main impediment in the Court's path is its own prior decisions in the area of libel law where the Court has repeatedly held that "[t]ruth may not be the subject of either civil or criminal sanctions." To avoid doctrinal inconsistency, the Court has two options: to distinguish the privacy tort from the libel tort or to question the value of truth. The Court appears to favor the latter approach, having started down this road by proclaiming that speech on matters of private concern merits only minimal protection under the first amendment.⁸

In section II, I conclude that Professor Schauer's thesis is dangerous because it suggests that it is appropriate for the Court to select among truths, declaring some "valuable" (and thus, worthy of first amendment protection) and branding others "valueless" (meriting little or perhaps no protection). Professor Schauer's thesis is all the more dangerous because he ignores, or at least fails to address, the ramifications of pursuing such a path. I will argue that if the Court were to apply his thesis and decide which truths are valuable and which are not, it would violate accepted first amendment principles. It would, moreover, go against Schauer's own theory of the first amendment's role in limiting the powers of the government. Finally, I will argue that history, both here and in England, has shown the danger of granting any branch of the government, even the judiciary, the power to decide which truths are of "value" to the public. Professor Schauer's piece is problematic if it is simply theory; however, if applied, it is a recipe for disaster, made more so by the Supreme Court's apparent inclination to follow it.

working definition of this privacy tort, is set out in the *Restatement*:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

Id. § 652D. As the *Restatement* itself points out, the tort provides liability for the "publicity given to true statements of fact." *Id.* special note.

6. See *infra* text accompanying notes 28-29.

7. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

8. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985).

I. PROFESSOR SCHAUER'S REFLECTIONS AS A THEORETICAL EXERCISE

Professor Schauer posits that there is such a thing as valueless truth or valueless knowledge:⁹ "some increases in knowledge simply have no intrinsic value."¹⁰ This is true for Professor Schauer, whether knowledge is considered to be an end in itself, or as merely instrumental to another end.¹¹

If Professor Schauer's article is simply a theoretical exercise—an argument that there may be such a thing as valueless truth—then the theory is problematic because of its hidden assumptions about what truths matter. Professor Schauer does not define for us what constitutes valueless knowledge,¹² but he offers some examples of what he views as "valueless." For instance, reports disclosing a private person's "unexposed physical deformities" or "status as a welfare recipient" or detailing a "recovering alcoholic[s]" past are all, according to Professor Schauer, valueless.¹³ For Professor Schauer, valueless knowledge seems likely to be found in tabloid newspapers whose real life exposés grace the racks of "supermarket check out counter[s]."¹⁴ It is these crass, embarrassing, but nevertheless, "human dramas" that he labels as valueless.

This seems a very narrow view of valuable knowledge. While some may learn from books, treatises, or even law review articles, many others do not. Real life stories are, for many, perhaps most, the way we learn of the community we live in and how to struggle with its pressures and problems. To characterize a *National Enquirer* exposé that "Mrs. Smith" is a recovering alcoholic as valueless, yet treat a *New York Times* article on increasing alcoholism among women as valuable, is to take a restrictive, verging on

9. See *supra* note 1 and accompanying text.

10. Schauer, *supra* note 1, at 712.

11. *Id.* at 710-11.

12. He does admit that this definition poses some "difficult questions," *id.* at 711, but as discussed in section II he backs away from providing any definition. See *infra* text accompanying note 23. In fact Schauer cannot give a specific definition of what constitutes valueless knowledge when knowledge is viewed as instrumental, because in such cases what is valueless varies with the end that knowledge is to serve. For instance, if the end is happiness, then valueless knowledge would presumably be knowledge that made people unhappy, or at least knowledge that did not increase happiness. This seems to leave us in a catch 22—we cannot know what knowledge is valueless until we select our ultimate goal; yet how can we select that goal without knowledge?

13. Schauer, *supra* note 1, at 712.

14. *Id.* at 709.

elitist, view of how we should learn.

It is also a view at odds with experience. Press reports of real life drama are not new. In England, the earliest hawkers sold the "real life" confessions of murderers under the gallows,¹⁵ and the earliest newspapers contained tales of human suffering and perversion.¹⁶

The American tradition is no different. The penny press of the 1830s filled its pages with stories of the unfortunates of the community.¹⁷ To characterize "personal tragedy" stories as "valueless" is to deny the value that generations of the public have found in such accounts.¹⁸ Thus, even as simply a theoretical exercise, Professor Schauer's thesis rests on a view of knowledge that

15. For example,

The inhabitants of eighteenth century England took great interest in the lives and deaths of notorious criminals. The *Newgate Calendar* sold ten times more copies than the *Spectator* or the *Rambler*, and the public appetite for crime news must have been apparent to the earliest hawkers of printed confessions of condemned men around Tyburn Tree.

M. JONES, *JUSTICE AND JOURNALISM* 9 (1974) (footnote omitted).

16. *Id.* at 18 (The first edition of the *Sunday Times* contained numerous reports of sexual perversion including that of "Edward Edridge, a haggard old wretch, 70 years of age" who was charged with having raped "his daughter-in-law, an interesting little girl 14 years of age, under the most atrocious circumstances.")

17. M. SCHUDSON, *DISCOVERING THE NEWS* 22 (1978).

The penny press invented the modern concept of "news." For the first time the American newspaper made it a regular practice to print political news, not just foreign but domestic, and not just national but local; for the first time it printed reports from the police, from the courts, from the streets, and from private households. One might say that, for the first time, the newspaper reflected not just commerce or politics but social life.

Id.

18. Undoubtedly Warren and Brandeis would side with Professor Schauer. Warren and Brandeis were anxious to suppress the *National Enquirers* of their day, which in their view, broadcast "idle gossip" and details of "sexual relations" to satisfy the "prurient taste" of the "indolent." See Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 196 (1890).

Moreover, for Warren and Brandeis, the public interest in such knowledge is not evidence of its usefulness for education, but evidence of how far the public has been corrupted and their minds enfeebled from prior perusal of such "gossip".

Each crop of unseemly gossip becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of the things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.

Id.

reflects the interests of an educated elite and discounts the interests of others.

My second criticism of Professor Schauer's essay also focuses on his view of knowledge. Professor Schauer presumes that we can identify particular items of knowledge and determine whether each item is of value.¹⁹ This fails to account for the fact that each item of knowledge is part of a seamless web.

Even assuming Professor Schauer is correct that, in isolation, one item of knowledge may be valueless, that item of knowledge may become valuable when joined with other items of knowledge. In short, Professor Schauer's reflection is flawed because he ignores the possibility that an item of knowledge that is valueless in isolation may become valuable when combined with other "valueless" knowledge. It is because we cannot predict when one valueless item is part of a valuable combination that we can never, with the certainty Professor Schauer desires, brand any knowledge as valueless.

Thus, as simply a theoretical exercise, Professor Schauer's essay is subject to attack because of its implicit assumptions about the nature of knowledge. However, the practical implications of Professor Schauer's theories are even more disturbing. If we adopt Professor Schauer's article as a prescription for constitutional interpretation, it will undermine the protections traditionally extended to speech and the press.

II. PROFESSOR SCHAUER'S REFLECTIONS AS A RECIPE FOR CONSTITUTIONAL DISASTER

A. Professor Schauer's Reflections as a Model for Constitutional Interpretation

If Professor Schauer's article is viewed as a model for constitutional interpretation it seems to have two prongs. First, it asserts that there is such a thing as valueless truth, which apparently merits little or no constitutional protection. Second, it rejects truth and/or knowledge as the rationale underlying the first amendment, and instead posits that constitutional protection should focus on power.²⁰ Thus, Professor Schauer suggests that when we

19. Schauer, *supra* note 1, at 712-13.

20. *Id.* at 717-18. This constant regression, discovering that truth is merely instrumental to knowledge, which is itself instrumental to power, seems to leave Professor Schauer open to a methodological attack. Comment of Professor William P. Marshall,

discuss the privacy tort, we must focus not just on the value of the speech at issue, but also on the power of the individuals involved.²¹ When combined, these two principles seem to support the constitutionality of the privacy tort when it is used by the powerless to sue the powerful. Thus, when valueless true speech is published by a powerful entity and injures the privacy interests of a powerless person, Professor Schauer's model entitles the powerless person to recover for invasion of privacy.

Professor Schauer's model, especially his power analysis, illuminates the current debate on privacy and libel law. In particular, his power analysis explains much about the Court's prior rulings on public and private figures.²² However, his proposal, that the Court should determine which truths are of value, is fraught with difficulties. Under Professor Schauer's model, the Court can punish true speech so long as the speech is of low value and the power relations of the parties warrant a remedy. Thus, Professor Schauer suggests that it is appropriate for the Court to determine if the true speech at issue is valuable or not. Having given the Court this "green light," Professor Schauer opts out, providing no guidance as to when true speech is valueless. Professor Schauer simply theorizes that

Once we acknowledge that not every increase in knowledge is for the good (however good is defined), we must be open to the possibility that the instances in which knowledge is not for the good might be collected into a usable and internally coherent class.²³

Case Western Reserve Law Review Symposium: The Right to Privacy One Hundred Years Later (Nov. 17, 1990). Will we see a new article next year suggesting that perhaps power is instrumental to something else, perhaps even to truth? *Id.*

21. While Professor Schauer seems to incorporate both the value of the speech at issue and the power of the parties involved as determinants of the constitutionality of the privacy tort, at times he appears to wholly reject any consideration of the value of speech and instead argues that the focus should be entirely on the power relationship of the parties. *See* Schauer, *supra* note 1, at 720. However, Professor Schauer insists that part of his power analysis is an evaluation of the "public good" of the speech at issue. *Id.* at 723-24. Thus, the better interpretation of his position seems to be that both the value of the speech at issue and the power of the parties involved should be used in determining the permissible scope of the privacy action.

22. *Id.* at 715-17, 718-24; *see* Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984) (arguing that public figures should not receive the same treatment as public officials).

23. Schauer, *supra* note 1, at 711-12. Curiously, Professor Schauer seems to admit that his concept of valueless truth bears a striking resemblance to the "newsworthiness" concept that already haunts privacy law. *See id.* at 702-03. Yet as even the Supreme Court has acknowledged, "newsworthiness" is so vague a defense that it "virtually swal-

It is when we seek an answer to the difficult question of how and who decides what truths are valueless that we discover how little, if any, freedom of speech this model guarantees. The dangers of Professor Schauer's model are all the more acute because a review of the Supreme Court's recent rulings suggests that the Court is inclined to follow Professor Schauer's path to constitutional havoc.

B. The Road to Constitutional Havoc

As Professor Schauer correctly observes, the Supreme Court has never decided whether the invasion of privacy tort can survive constitutional scrutiny.²⁴ The Court, however, has recognized that the privacy tort conflicts with the first amendment guarantees of free speech and free press. For instance, in *Cox Broadcasting Corp. v. Cohn*,²⁵ the Court described this conflict as a "face-off".

The version of the privacy tort now before us is that in which the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities. Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent²⁶

Having articulated this apparent "face-off," the Court failed to completely settle the conflict and decided only the narrower issue, that the publication of true information contained in a public record could never be punished by civil or criminal penalty.²⁷

low[s] the tort.'" *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) (quoting Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966)). Professor Schauer criticizes "newsworthiness" not for its vagueness, but as failing to account for the power relations of the persons involved and instead focusing simply on the speech at issue. See Schauer, *supra* note 1, at 723-24. This is incorrect; "newsworthiness" does vary with the position of the plaintiff. For instance, as Warren and Brandeis explained, "Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office." Warren & Brandeis, *supra* note 17, at 215. Courts have also accepted this view. See, e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir.) (scope of newsworthiness varies with plaintiff's status as a public official, public figure, or private person), *cert. denied*, 311 U.S. 711 (1940).

24. Schauer, *supra* note 1, at 700; see Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 303 (1983).

25. 420 U.S. 469 (1975).

26. *Id.* at 489.

27. *Id.* at 496 ("At the very least, the First and Fourteenth Amendments will not

Since *Cox Broadcasting*, the Court has continued to evade the issue, or, in its own words, "carefully eschewed reaching [the] ultimate question" of whether a "truthful publication [could ever] be punished."²⁸ However, in *Florida Star*, the Court's most recent decision, both the majority and the dissent hinted that they were inclined to uphold the constitutionality of the privacy tort, at least in certain cases: "We do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of [private true facts] might be so overwhelmingly necessary to advance these interests as to satisfy the [applicable constitutional] standard."²⁹ Thus the Court seems poised to declare the privacy tort constitutional.

1. *New York Times* Applied to Privacy

The debate about the constitutionality of the privacy tort boils down to a debate about the value of truth. If true speech is so valuable to the first amendment that it cannot be restrained or punished, then the privacy tort must be unconstitutional because its aim is to punish true speech. On the other hand, if true speech is not a preeminent value under the first amendment, then perhaps punishing true speech is acceptable, and the privacy tort is constitutional. Thus, if the Supreme Court wishes to declare the privacy tort constitutional, it must start by confronting its prior statements about the value of true speech.

The Court has repeatedly asserted, particularly in the libel context, that true speech lies at the heart of the first amendment protection. From *Garrison v Louisiana*,³⁰ where the Court declared "[t]ruth may not be the subject of either civil or criminal sanctions .,"³¹ to *Gertz v Robert Welch, Inc.*,³² where the Court justified protecting "some falsehood in order to protect [truth]," the Court has consistently mouthed the belief that true speech must be protected.³³ In fact, the lesson of *New York Times*

allow exposing the press to liability for truthfully publishing information released to the public in official court records.").

28. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *accord* *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) ("present[ing] no question whether truthful publication of [private and outrageous facts] could be constitutionally proscribed").

29. *Florida Star*, 491 U.S. at 537.

30. 379 U.S. 64 (1964).

31. *Id.* at 74.

32. 418 U.S. 323 (1974).

33. *See id.* at 341.

*Co. v Sullivan*³⁴ and its progeny is that true speech is so important that false speech will be protected, not because false speech has any inherent value, but because in the absence of this buffer zone, some true speech might be deterred or chilled.³⁵

The current Supreme Court cannot disregard this praise of truth as the verbiage of a past "liberal" court, since the Rehnquist Court itself has continued to confirm that true speech is of central importance to the first amendment. For instance, in *Philadelphia Newspapers, Inc. v Hepps*,³⁶ the Court reaffirmed that any chilling of true speech was "antithetical to the First Amendment's protection."³⁷ If the Constitution does not allow true speech to be chilled, then how can the privacy tort—which punishes true speech—survive constitutional scrutiny?

Moreover, *Philadelphia Newspapers* seemed to drive the final nail in the coffin of the privacy tort when it held that a libel plaintiff was constitutionally required to prove falsity in order to recover.³⁸ If the constitutional requirement of proof of falsity in libel cases is applied to privacy, then the privacy tort is destroyed since by definition it is a suit over true speech.

2. Distinguishing the Privacy Tort

One route the Court might take to avoid the "truth verbiage" of the libel cases is to assert that privacy is a different tort from libel. This is a distinction without a difference. Initially, it is noteworthy that the Court has always treated libel decisions as indicative of privacy law. For instance, in its false light cases, although the Court loudly protested that it was not engaging in a "blind

34. 376 U.S. 254 (1964).

35. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) ("To provide 'breathing space' for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation.") (citation omitted) (emphasis in original); *Gertz*, 418 U.S. at 340-41; *New York Times*, 376 U.S. at 279 ("Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred."); see also Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 705-11 (1978) (analyzing the "chilling effect" doctrine).

36. 475 U.S. 767 (1986).

37. *Id.* at 777.

38. *Philadelphia Newspapers*, 475 U.S. at 769 ("[A]t least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.").

application of *New York Times Co. v. Sullivan*,³⁹ the Court nevertheless applied libel law directly to false light privacy cases.⁴⁰

When the Court faced its first real privacy case, *Cox Broadcasting Corp. v. Cohn*,⁴¹ the Court again turned, without hesitation, to libel law to set the boundaries of the privacy tort. While the Court ultimately refused to rule on the constitutionality of the privacy tort, it did hold that where false speech is at issue, the Constitution imposes the same standard regardless of whether the asserted injury was to reputation or to privacy.⁴² Thus the Court has never suggested that the torts of privacy and libel should be treated differently but rather has implied that the resolution of the libel question answers the privacy issue.⁴³

An analysis of the two torts confirms that the Court is correct in treating them alike. Although the torts apparently focus on the protection of different interests, *i.e.*, reputation and privacy, it is difficult to see any relevant distinction between these two interests. Although amorphous, the privacy tort seems to involve some idea of "human dignity" and a "right to be let alone."⁴⁴ Yet, how is this distinct from the interest at stake in libel?

The Court has frequently referred to reputation as an aspect of human dignity⁴⁵ and thus protected it. The tort of libel, however, protects an additional element—the value of an individual's image in the community. Thus, reputation seems the stronger in-

39. *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967).

40. *See, e.g., Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

41. 420 U.S. 469 (1975).

42. *Id.* at 490 ("where the interest at issue is privacy rather than reputation and the right claimed is to be free from the publication of false or misleading information about one's affairs, the target of the publication must prove knowing or reckless falsehood").

43. The Court may have begun the process of treating the two torts separately in a recent decision. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, the Court distinguished between privacy law and the law relating to "defamatory falsehoods." *Id.* at 530 n.5.

Interestingly, the Court classified *Time v. Hill*, a false light case, as a libel case. *Florida Star*, 491 U.S. at 530 n.5. This may be an effort to distinguish false light privacy cases, which use *New York Times* analysis, from pure privacy cases. *But see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (applying the constitutional requirements developed in libel law to the tort of intentional infliction of emotional distress).

44. *Warren & Brandeis, supra* note 18, at 193, 195 (quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)); *see Zimmerman, supra* note 24, at 321-24.

45. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-58 (1985) ("[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being'" (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring))).

terest, having both an internal human dignity element, as does privacy, and an external image element, which privacy lacks.⁴⁶ If this two-dimensional reputational interest is not enough to justify punishment of true speech, then how can privacy, a weaker, one-dimensional interest, justify such a limit?

Another purported distinction between the two torts, that the privacy tort seeks to compensate for emotional distress while libel seeks to compensate for the plaintiff's reputational harm, seems equally unconvincing. The Court's recent decision in *Hustler Magazine, Inc. v. Falwell*,⁴⁷ indicates that the Court is not willing to make a distinction between torts seeking compensation for emotional distress caused by speech and those seeking compensation for reputational damage. In *Falwell*, a public figure plaintiff sued for intentional infliction of emotional distress based on a parody. Even though the emotional distress tort, like the privacy tort, is focused (explicitly) on emotional distress and has little to do with truth and nothing to do with reputation, the Court nevertheless held that the Constitution required the plaintiff to prove falsity and fault. The Court simply applied the first amendment requirements developed in libel law to the emotional distress tort. Thus, once again, the Court did not see any significant difference between the interests being protected. Moreover, the Court in *Falwell* once again forces us to face the hard question that if falsity is a constitutional requirement in emotional distress cases as well as in libel cases, then why not in privacy suits?

Thus, an analysis that seeks to distinguish privacy and libel based on the interest asserted seems bound to fail. The alternative is to focus instead on the speech side of the issue. Is the speech at stake in privacy actions less valuable than that involved in libel suits? The obvious answer to this is no. The same speech can harm reputation as can harm privacy. For instance, the statement

46. Many privacy suits appear to assert both a privacy and a reputational interest, and thus come even closer to the libel tort. For instance in the infamous Red Kimono case, the plaintiff, who at the time was leading an "exemplary, virtuous, honorable and righteous life," sought damages in privacy because the defendants revealed her past life in which she engaged in prostitution and was suspected of murder, causing her new friends "to scorn and abandon her [thereby] exposing her to obloquy, contempt, and ridicule." *Reid v. Reid*, 112 Cal. App. 285, 286, 287, 297 P. 91, 91 (1931). The court recognized this interest in being free "from unnecessary attacks on character, social standing or reputation" as being a privacy claim and upheld the award of damages. *Id.* at 291, 297 P. at 93; see Zimmerman, *supra* note 24, at 322 ("[s]ome [privacy] cases clearly involve both reputational harm and the probable infliction of substantial amounts of mental distress").

47. 485 U.S. 46 (1988).

that "Lawyer X has a secret drug addiction," could be the subject of both a libel action and a privacy action. The only distinction is that in the libel case the speech must be false and in the privacy case the speech could be true. How can the true speech at stake in the privacy case be of less constitutional concern than the same, but false, speech involved in the libel case? On the contrary, the Court's libel rulings suggest there should be more, not less, concern in privacy cases because true speech is at stake. Thus, any effort to distinguish the torts on grounds of the words spoken must fail.

In fact, the Court's recent decision in *Florida Star v B.J.F.*,⁴⁸ confirms this analysis. The Court noted it would be a "perverse result [if] truthful publications challenged pursuant to [a privacy] cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods

⁴⁹ Thus, while the Court appears anxious to recognize the privacy tort, it will be hard pressed to explain why the constitutional requirements it has imposed on libel law do not apply with equal severity to the privacy tort.

C. Protecting Privacy by Devaluing Truth—The *Dun & Bradstreet* Approach

Alternative to claiming that privacy is a more important interest than reputation, or suggesting that the speech at issue is different in privacy cases, is to assert that certain true speech is of little or no value. Such valueless true speech can, therefore, be trumped by privacy, or, for that matter, by defamation or countless other opposing considerations. Thus, the privacy tort survives constitutional scrutiny not because privacy is a higher or more important interest, but because true speech is devalued.

This is precisely the shift in approach that Professor Schauer advocates. Rather than arguing the importance of privacy, he simply attacks the other side of the equation by asserting that some true speech is valueless. The danger of this approach is that it comes at a time when the Supreme Court is casting about for a rationale to justify upholding the constitutionality of the privacy tort and has taken already its first faltering steps down the road to declaring that all truths are equal, but some truths are more equal

48. 491 U.S. 524 (1989).

49. *Id.* at 539.

than others.⁵⁰

The trend to devalue certain true speech is already evident in the Court's libel decisions, specifically in its distinction between speech on matters of "public concern" and speech on matters of "private concern."⁵¹ While "public concern" speech is of utmost constitutional importance and is strongly protected, "private concern" speech is of less value, if not valueless, and therefore, receives minimal, if any, protection.

This trend of assigning different values to speech protected by the Constitution first surfaced in libel law in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁵² Greenmoss Builders, a private figure plaintiff, sued Dun & Bradstreet for libel based on a false report of the company's bankruptcy. The lower court allowed recovery of presumed and punitive damages in violation of the requirement set out in *Gertz*, which held that even private plaintiffs must prove actual malice before such damages are awarded. Rather than applying *Gertz*, the Supreme Court rewrote it, ruling that the *Gertz* damage limitation only applies to speech of public concern.⁵³ The Court simply declared that it had "long recognized that not all speech is of equal First Amendment importance."⁵⁴

50. With apologies to George Orwell. See G. ORWELL, *ANIMAL FARM* 148 (1945) ("All animals are equal, but some animals are more equal than others.").

51. This distinction first surfaced in a federal employment case, *Connick v. Myers*, 461 U.S. 138 (1983). Subsequently, the Court applied this distinction to libel law. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). This "public concern" test bears a strong resemblance to the test of speech on "matters of public or general concern," which a plurality of the Court had advocated in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971). However, three years after *Rosenbloom* the Court emphatically rejected this approach, in part because of the application problems discussed below. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). The full history of the "public concern" test is traced in Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990).

52. 472 U.S. 749 (1985).

53. The Court left open the issue of whether the *Gertz* requirement that a private plaintiff prove some degree of fault is also limited to cases where the speech was of "public concern." Justice White, however, had no hesitation in concluding that it is. *Id.* at 773-74 (White, J., concurring) ("Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this."). White's suggestion seems supported by the Court's later assertion that "When the speech is of exclusively private concern and the plaintiff is a private figure the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Philadelphia Newspapers*, 475 U.S. at 775.

54. *Dun & Bradstreet*, 472 U.S. at 758. As Professor Estlund documents, the Court had long emphasized that speech on political matters was close. However, *Dun & Brad-*

The Court explained that while "speech on 'matters of public concern' is 'at the heart of the First Amendment's protection,' speech on matters of purely private concern is of less First Amendment concern."⁵⁵ The Court then held that because of the "reduced constitutional value of speech involving no matters of public concern," the *Gertz* limitation on damages need not apply.⁵⁶

Arguably, one can read the *Dun & Bradstreet* decision as recognizing that false speech on a matter of private concern is of lesser value than false speech on a matter of public concern. Such a reading, however, is contrary to the logic of the cases. Protection was extended in *Gertz* to false speech, not because of any value of the false speech,⁵⁷ but rather because of the danger that true speech would be chilled. It is, therefore, true speech that is valuable, and that merits constitutional protection. When *Dun & Bradstreet* withdrew protection because speech of private concern is of less value, it withdrew protection from true speech.

The very concept of valuing true speech is questionable. However, *Dun & Bradstreet* is even more troubling, because the Court, like Professor Schauer, refuses to inform us what test it is using to determine which speech is of value. While mouthing that the criteria for determining "whether speech addresses a matter of public concern [are] content, form, and context,"⁵⁸ the Court simply states that the speech at issue is not of "public concern" because (1) it was "solely in the individual interest of the speaker and its specific business audience," (2) it was not widely disseminated, but rather "made available to only five subscribers," and (3) it was a profit-motivated publication and thus unlikely to be chilled.⁵⁹ As the dissent charges, this test is

street and *Connick* were decidedly different, as there for the first time the Court held that to qualify for protection, speech had to be on a matter of public concern. Estlund, *supra* note 51, at 19.

55. *Dun & Bradstreet*, 472 U.S. at 758-59 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

56. *Id.* at 761.

57. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (false speech has no constitutional value).

58. *Dun & Bradstreet*, 472 U.S. at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

59. *Id.* at 762. Numerous commentators have analyzed this test. *E.g.*, Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988); Estlund, *supra* note 51, at 32-39.

vague and unworkable,⁶⁰ and the only insight gained from the decision is that political speech is valuable, while bankruptcy reports are not.

Dun & Bradstreet is not an isolated case. In *Philadelphia Newspapers, Inc. v Hepps*,⁶¹ the only private figure libel case since *Dun & Bradstreet*, the Court extended the protection afforded to speech on matters of public concern, but refused to hold such protection available to speech relating to private matters.⁶² The Court not only reapplied the public concern/private concern distinction but even implied that private concern speech might warrant no constitutional protection at all.⁶³ Thus, the Supreme Court has taken the first few tentative steps down Professor Schauer's path of declaring some truths of little or no value. Distinguishing between public concern speech and private concern speech solves the Court's problem with the privacy tort. The privacy tort concerns speech on a "private matter" (almost by definition), thus it is of lesser constitutional importance and the requirements of *New York Times* and *Philadelphia Newspapers* are simply inapplicable.

The problem for the Court with this approach, however, is two-fold. First, the Court has failed to offer any rationale for holding that some true speech is of more importance than other true speech, or to use its terminology, that some true speech is of public concern, and other true speech is not. Second, and more fundamentally, the Court lacks any doctrinal or theoretical basis from which to assert that valueless true speech exists. Professor Schauer provides the Court with doctrinal support by distinguishing a category of "valueless true speech" for which little, or perhaps no, first amendment protection is required.

60. *Dun & Bradstreet*, 472 U.S. at 786 (Brennan, J., dissenting) ("The five Members of the Court voting to affirm the damages award in this case have provided almost no guidance as to what constitutes a protected matter of public concern.").

61. 475 U.S. 767 (1986).

62. *Id.* at 768-69 ("Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.").

63. *Id.* at 775 ("When the speech is of exclusively private concern and the plaintiff is a private figure the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.").

D. Professor Schauer's Model as a Recipe for Constitutional Action

Although Professor Schauer correctly identifies the issue, he offers the Court little guidance and fails to warn the Court of the dangers that lie ahead. First, Professor Schauer's theory does not help the Court define or identify valueless truth. In this regard he mirrors the Court, which has refused to define "public concern" and which instead adopts an "I know it when I see it"⁶⁴ approach. While it may be acceptable for Professor Schauer to "hide the ball," it is unacceptable for the Court. The Court must reveal the values it uses to determine what true speech is of public concern and what speech is not.

Second, Professor Schauer's article lends a cloak of legitimacy to what the Supreme Court is doing. Professor Schauer implies that it is acceptable to engage in a valuing of true speech.⁶⁵ Allowing the courts to value true speech contradicts Professor Schauer's own theory. Professor Schauer asserts that maintaining the proper power balance between the government and the public lies at the center of the first amendment, not protection of truth. As Professor Schauer concluded:

New York Times, therefore can be seen as a case not about increasing the availability of politically relevant information to the public so that public deliberations can approach some supposed ideal, but rather as primarily about (1) the availability of politically relevant information to the public so that they can exercise *more power vis-a-vis their governors*, and (2) the impermissibility of the *governors exerting power over the governed* by restricting the information available to the governed.⁶⁶

Thus, for Professor Schauer, the central idea of the first amendment is to prevent the government from gaining power over the public, and, in particular, to prevent the government from having the power to limit public access to information.

Yet Professor Schauer's proposed model hands over exactly this power to the government. What greater power could the government wish for than the power to tell the public that certain truths are not of value? The inevitable result of Professor

64. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (regarding obscenity).

65. Schauer cites with approval to *Dun & Bradstreet* and the Court's apparent willingness to afford lesser protection to truths that are not of "public concern." Schauer, *supra* note 1, at 703-04.

66. *Id.* at 716 (emphasis added).

Schauer's theory of valueless knowledge is that the governors, or at least their judicial agents, get the power to decide what knowledge is good for the public.⁶⁷ Thus, Professor Schauer's theory of valueless knowledge seems to result in a direct violation of the power principle that he places at the heart of the first amendment.⁶⁸

Moreover, granting the Court the power to determine acceptable truths violates not only Professor Schauer's theory but also one of the most basic tenets of today's constitutional landscape—that the government cannot engage in content-based discrimination. As the Supreme Court held in *Police Dept. v Mosley*,⁶⁹ "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."⁷⁰ Why should the courts be immune from such a bar on content-based discrimination? Allowing the courts to declare some true speech valuable and some true speech valueless based on its subject matter is the most blatant exercise in content-based discrimination.⁷¹ In fact after a plurality of the Court flirted with the idea of a "public interest" test to define the level of first amendment protection in libel

67. As Professor Post points out, allowing the Court to determine matters of public concern goes against not just Professor Schauer's theory of power but also against much of democratic theory: "Democratic self-governance posits that the people control the agenda of government . . . The normative conception of public concern, insofar as it is used to exclude speech from public discourse, is thus incompatible with the very democratic self-governance it seeks to facilitate." Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 670 (1990); Estlund, *supra* note 51, at 30-32.

68. It may be that Professor Schauer himself agrees that the power of deciding that some truths are valueless is too great a power to hand to any institution. He notes that the power to distinguish truth from falsity and declare some facts as false may be too dangerous a power to give to any institution: "Nothing in the foregoing examples is designed to take a position about the consequences of establishing some institution to determine truth and falsity. Of course, the benefits of falsity might be overwhelmed by the harms consequent upon establishing some institution to determine which falsehoods are socially desirable . . ." Schauer, *supra* note 1, at 706 n.31. If the power to punish some falsities is too great a power to give to an institution, then how can the power to declare some truths "valueless" be constitutionally sound?

69. 408 U.S. 92 (1972).

70. *Id.* at 95.

71. The Court had previously determined that certain areas of speech are not protected by the first amendment because of their content. For example the decision that obscenity is not within the first amendment is based on the content of the speech at issue. However, Estlund points out that "[b]efore *Connick* [and *Dun & Bradstreet*], the Court had largely foresworn explicit content-based distinctions among 'fully-protected' messages." Estlund, *supra* note 51, at 20.

cases,⁷² their position was speedily rejected in *Gertz* precisely because such a test would "forc[e] state and federal judges to decide

which publications address issues of 'general or public interest' and which do not" and the Court "doubt[ed] the wisdom of committing this task to the conscience of judges."⁷³

These points of constitutional theory are supported by the lessons of history. As Professor Schauer points out, the only area where the courts traditionally had the power to declare some truths "injurious" was in criminal libel.⁷⁴ The history of the English courts' usage of this power is a clear warning of the danger of allowing courts to determine which truths are of value to the public. For instance, Justice Holt, in *Regina v Tutchin*,⁷⁵ held that the most dangerous and least valuable truths were those that criticized the government:

[I]f the people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime and no government can be safe without it.⁷⁶

Today's Supreme Court seems to lean the other way, declaring political discussion "of value" and economic information "val-

72. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

73. *Gertz*, 418 U.S. at 346; accord *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting) ("Assuming that courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. The danger such a doctrine portends for freedom of the press seems apparent.") Both Justice Marshall and Professor Estlund, *supra* note 51, at 46-49, are concerned with judges making "honest" mistakes as to what constitutes a matter of public concern. My concern is that the government, including the judiciary will deliberately use the power to define what is of public concern to stifle public debate.

74. Schauer, *supra* note 1, at 700. Schauer is correct that, as it evolved at common law, the crime of libel did not allow truth as a defense. Interestingly, the statute *Scandalum Magnatum*, 1275, 3 Edw. I, ch. 34, from which criminal libel is thought to have originated only punished false news, but the Star Chamber rejected any such limitation in its infamous decision *de Libellis Famosis*, 5 Coke Reports, 125a, [1606] 3 Jac. 1 ("It is not material whether the Libel be true, or whether the Party against whom it is made, be of a good or ill Fame"). See generally, F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776*, at 118-19 (1965) (surveying the judicial suppression of political discussion from 1603-1640, including the law of seditious libel).

75. [1704] 14 state trials 1095.

76. *Id.*

ueless.”⁷⁷ Yet, if we encourage the Court to enter this game of valuing truths, especially without even demanding that the ground rules be set, the fearful lessons of history may be repeated.

CONCLUSION

The Supreme Court seems poised to recognize the privacy tort. To do so, it must either draw some meaningful distinction between libel and privacy (which I have argued is impossible) or simply assert that some truths are valueless and, therefore, deserve little or no first amendment protection. The Court's willingness to accord lesser protection to speech of private concern than to speech of public concern seems a dangerous first step to declaring that some truths are just not important.

Professor Schauer attempts to justify this idea of valueless truths. A close analysis of his theory, however, reveals that the idea of a valueless truth is problematic in itself. Moreover, any attempt to translate his theory into a legal reality would require empowering the courts to decide what truths are of value to the public. Such an empowerment violates not only Professor Schauer's own vision of the first amendment but runs contrary to the Supreme Court's repeated admonition that content-based discrimination by the government is impermissible. Moreover, Professor Schauer's own imagery, likening privacy to criminal libel, serves to remind us how such a power to determine which truths are acceptable has been abused in the past. In short, Professor Schauer's theory must be rejected as it legitimizes the devaluation of truth while ignoring the grave constitutional dangers such a step entails.

77. See *Dun & Bradstreet*, 472 U.S. at 762, 758-59.

